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No. 81-5390

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

MICHAEL MARNELL SMITH,

Petitioner

v.

EDWARD C. MORRIS,

Respondent

ON WRIT OF CERTIORARI TO

THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In a capital murder case involving complex psychiatric issues in aggravation and mitigation of punishment, in which counsel

(a) failed to secure a protective order to allow a meaningful and independent psychiatric examination,

(b) failed to discuss with Petitioner the purpose of his psychiatric examinations, and

(c) failed to advise Petitioner of the uses to which statements made to his examiners might be put,

did counsel's failure to protect Petitioner's privilege against self-incrimination in connection with statements made during pre-trial psychiatric examinations deny Petitioner effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution?

2. In a capital murder trial involving damaging testimony of an examining psychiatrist, Dr. Pile, in which counsel

(a) failed to prepare adequately for cross-examination of Dr. Pile,

(b) failed to recognize that Dr. Pile's testimony at trial was based on an indisputably inadequate examination,

(c) elicited from Dr. Pile on cross-examination testimony more damaging than any testimony offered on direct examination, and

(d) failed to competently cross-examine Dr. Pile,

was Petitioner denied his right to the adequate and effective assistance of counsel, in violation of the Sixth and Fourteenth Amendments to the United States Constitution?

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OPINIONS BELOW

This Petition for Writ of Certiorari is based on a Petition for Writ of Habeas Corpus filed in the Circuit Court for the City of Williamsburg and the County of James City on June 28, 1979. The underlying conviction was imposed on November 2, 1977, and the death penalty was imposed by the jury on November 3, 1977. Citations to the record of the trial will be made herein as "TT." ("Trial Transcript"). That judgment was affirmed by the Virginia Supreme Court in Smith v. Commonwealth, 219 Va. 455 (1978). This Court denied Petitioner's Petition for Writ of Certiorari on May 21, 1979. 441 U.S. 967.

After the filing of the Petition for Writ of Habeas Corpus, a plenary hearing was held on Petitioner's claim of ineffective assistance of counsel. Citations to the record of that hearing will be made as "HT." ("Hearing Transcript"). The Petition for Writ of Habeas Corpus was denied pursuant to Findings of Fact and Conclusions of Law issued March 14, 1980; the final order in the case was entered on April 16, 1980, to which Petitioner noted his objections. Both the Findings of Fact and Conclusions of Law and the final order are included in the Appendix to this Petition. Petitioner's Petition for Appeal, filed with the Virginia Supreme Court, was denied on April 24, 1981; no opinion was written. A copy of the order is included in the Appendix to this Petition. Petitioner's Petition for Rehearing was denied on June 12, 1981; a copy of that order is also appended hereto.

JURISDICTION

The judgment for which review is sought is the order of the Virginia Supreme Court dated April 24, 1981, in which no error was found in the findings and conclusions of the trial

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court. Petitioner's Petition for Rehearing in the Virginia Supreme Court was denied on June 12, 1981.

This Court has jurisdiction to review the judgment of the Supreme Court of Virginia pursuant to 28 U.S.C. §1257(3), in that your Petitioner alleges a violation of his right to the effective assistance of counsel at his capital sentencing hearing, a right guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution states, in pertinent part, as follows:

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution states, in pertinent part, as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law . . .

STATEMENT OF FACTS

This case involves the first case tried under the post-Gregg Virginia death penalty statute, Va. Code Ann. §19.2-264.2 et seq. (Cum.Supp. 1977), effective date July 1, 1977.

On May 23, 1977, Mrs. Audrey Weiler was raped and murdered near Williamsburg in James City County; Petitioner was arrested and charged with the crimes shortly thereafter. On May 26, 1977, David F. Pugh was appointed to represent Petitioner; he immediately asked that Petitioner be examined to determine whether he was competent to stand trial. The examination was conducted by Dr. Palmaz, who stated that, in his opinion,

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Petitioner was competent to stand trial.

On July 1, 1977, at Mr. Pugh's request, the trial court ordered that Petitioner undergo psychiatric evaluation by Dr. James C. Dimitris and the staff of the Forensic Unit at Central State Hospital; he was hospitalized there from July 5, 1977 to August 23, 1977. Dr. Dimitris told Petitioner before the examination began that any statements by him during the examination could be used against him at either the guilt or sentencing phase of his trial (HT. 174). Dr. Dimitris diagnosed Petitioner as having an "inadequate personality" and concluded that he was legally sane at the time of the offense.

By Order dated September 28, 1977, Petitioner's counsel requested, and was granted, permission to have Petitioner examined by Dr. Wendell Pile, a local Williamsburg psychiatrist with no training in forensic psychiatry. Dr. Pile conducted a one-hour examination on October 1. Dr. Pile testified at the hearing that he encouraged Petitioner to make full disclosure of the circumstances of the offense with which he was charged, and of any prior offense. He also stated that he did not advise or warn Petitioner that copies of his report would be sent to the Commonwealth's Attorney and the Court, or that any statements made by Petitioner could be used against him at trial (HT. 16). During this interview, Petitioner mentioned having assaulted a girl on a school bus.

In his October 1, 1977, letter to the court and counsel, Dr. Pile mentioned the school bus incident, which until that time had been unknown to either defense counsel or the Commonwealth's Attorney. In that letter, Dr. Pile "diagnosed" Petitioner as a "sexually deviant sociopath." At the plenary hearing, both Dr. Robert Showalter and Dr. James C. Dimitris, the two forensic psychiatrists who testified, stated that the

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information available to Dr. Pile for his examination was not clinically sufficient to support his diagnosis (HT. 97, 214).

Both Dr. Dimitris and Dr. Pile were requested only to assess Petitioner's competency to stand trial and sanity at the time of the offense; neither examiner was asked to perform the more subtle evaluation required for a determination of the presence of the mitigating circumstances outlined in the capital sentencing statute. Dr. Dimitris testified that he was not even made aware of the special requirements of the death penalty statute until the day of the sentencing trial, and even then the emphasis was on the dangerousness criterion (HT. 190, 242). Dr. Pile testified that the provisions of the capital sentencing statute were never brought to his attention (HT. 22). In fact, Dr. Pile did not realize that the capital sentencing definitions of mitigating mental abnormality were not interchangeable with the standard M'Naghten inquiry for insanity (HT. 48). Counsel never contacted Dr. Pile to discuss the purpose of the evaluation (HT. 22, 249).

Mr. Pugh testified that he had advised Petitioner not to discuss the offense or any prior offenses "with anyone" (HT. 236). Although he did not recall whether he had specifically warned Petitioner not to discuss the offense with his psychiatric examiners, he testified that he believed that he did not expect Petitioner to discuss the offense with the psychiatrists (HT. 236-37, 246-47). Mr. Pugh's general advice was not followed; Petitioner discussed the offense with both examiners. Before beginning his examination, Dr. Dimitris gave Petitioner the equivalent of Miranda warnings; Dr. Pile did not.

The evidence of guilt at trial was overwhelming; a signed confession was corroborated by much physical evidence. On November 2, 1977, Petitioner was convicted by a jury of capital murder following rape, in violation of Va. Code Ann. §§18.2-10(a) and -31(e) (Cum.Supp. 1977). The next day the sentencing

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hearing began under Virginia's bifurcated procedure, prescribed by Va. Code Ann. 19.2-264.2 et seq. (Cum.Supp. 1977). The Commonwealth called Dr. Pile to testify as to the future dangerousness of Petitioner, and Dr. Pile related, over objection, what Petitioner had told him about the school bus incident.

> Q. Did he tell you anything about the girl on the school bus?
>
> A. He did.
>
> Q. What did he say about that?

(Objections and argument omitted.)

> A. He explained that he was driving a school bus. That he came close to assaulting a girl. He tore her clothes off, but then thought better of raping her, and did not do so.

(TT. 929 - 32). The Commonwealth's Attorney did not ask Dr. Pile about his "diagnosis" of Mr. Smith; however, on cross-examination, defense counsel did ask.

> Q. Doctor Pile, in your diagnosis, what was your diagnosis of Michael Smith?
>
> A. I felt that he was a sociopathic personality, sexual deviation, rape.
>
> Q. What is that?
>
> A. A person who--is also described as an antisocial personality. They're all sort of the same type of--of personality disorder. The basically people who are unsocialized, and they're repeatedly in conflict with the Court. They don't seem to have any capability of--of having loyalty to anybody, to any group or to any social values. Usually, they're rather irresponsible. They seem to feel no guilt, and they don't seem to learn from experience or punishment. They seem to particularly have no feelings or standards of what's right and what's wrong.

(TT. 936-37) Dr. Showalter testified that such speculation about the usual behavior of sociopaths lacks any scientific foundation (HT. 92).

Upon being instructed by the Court, the jury found, inter alia, that there was a "probability" that Petitioner "would commit criminal acts of violence that would constitute a

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continuing threat to society," and they recommended the death penalty. After reviewing the post-sentence report, Judge Carneal affirmed the jury's recommendation and sentenced Petitioner to death on November 30, 1977.

On automatic appeal and review of sentence, the Virginia Supreme Court affirmed, in Smith v. Commonwealth, 219 Va. 455 (1978). This Court denied Petitioner's Petition for a Writ of Certiorari on May 21, 1979. 441 U.S. 967.

On June 28, 1979, Petitioner filed his Petition for a Writ of Habeas Corpus, claiming, inter alia, that he had been denied the effective assistance of counsel at and in connection with his capital sentencing hearing, in violation of the Sixth and Fourteenth Amendments to the United States Constitution. After a pretrial conference on September 28, 1979, the Circuit Court, by order dated November 8, 1979, refused to consider five of Petitioner's claims, on the ground that they had not been previously raised at trial and preserved on appeal. An evidentiary hearing was held on November 8, 1979, on Petitioner's claim of ineffective assistance of counsel. On March 14, 1980, Judge Carneal issued his Findings of Fact and Conclusions of Law, finding that Petitioner received "adequate assistance of counsel," and denying the Petition for a Writ of Habeas Corpus. A final order was entered on April 16, 1980, to which Petitioner objected.

A Petition for Appeal was timely filed with the Virginia Supreme Court, in which the issue of ineffective assistance of counsel, raised as a question involving the Sixth and Fourteenth Amendments to the United States Constitution, was assigned as Error Number 8, and was argued as Question 3 of the Petition for Appeal. The Petition was denied, no error being found, on April 24, 1981. Petitioner's Petition for Rehearing,

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timely filed, was denied on June 12, 1981. It is this final disposition from which Petitioner takes this appeal.

ARGUMENT

PETITIONER DID NOT RECEIVE THE ADEQUATE ASSISTANCE OF COUNSEL AT AND IN CONNECTION WITH HIS CAPITAL SENTENCING HEARING.

It is important that this Court address again the standards for ineffective assistance of counsel, elaborating on and elucidating this Court's opinion in McMann v. Richardson, 397 U.S. 759 (1970). The Virginia Supreme Court has effectively ignored the McMann decision and its "range of competence" test for ineffective assistance; in Slayton v. Weinberger, 213 Va. 690, 194 S.E.2d 703 (1974), that court reaffirmed its "farce and mockery of justice" test, an outmoded test based on Fifth Amendment, rather than Sixth Amendment, principles. The Virginia Supreme Court has apparently also ignored the Fourth Circuit's treatment of the issue in Marzullo v. Maryland, 561 F.2d 540 (1977). Virginia trial courts, such as the court in which this Petition for Writ of Habeas Corpus was first presented, have often regarded this Court's language in McMann to be non-binding dictum, or, if they purport to be bound by McMann, they do not seem to understand the test.

Most of the cases in which the death penalty was imposed and affirmed by the Virginia Supreme Court are now in state habeas corpus review, or soon will be. State trial courts are giving hearings on the question of ineffective assistance, hearings in which the outmoded "farce and mockery of justice" test is being applied. The conclusions of those trial courts will not be acceptable in federal district courts when the cases are brought there after state post-conviction remedies have been exhausted, because they will involve the application of the wrong legal standard.

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In the interests of judicial economy, therefore, Petitioner urges this Court to grant certiorari, to review the case on its merits, to make clear to the state courts in Virginia and elsewhere that this Court meant what it said in McMann. A decision from this Court at this time would force the state courts to apply the correct legal standard, and would greatly increase the likelihood that the courts would issue findings and conclusions that federal district judges would be able to apply.

A. The trial court either did not understand or incorrectly applied this Court's decision in McMann v. Richardson when it held that Petitioner had received adequate assistance of counsel at his sentencing hearing.

Petitioner based his arguments of ineffective assistance of counsel on the standard espoused in this Court's decision in McMann v. Richardson, 397 U.S. 759, 770-71 (1970)--whether counsel's advice "was within the range of competence demanded of attorneys in criminal cases." In Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977), cert. denied, 435 U.S. 1011 (1978), the Fourth Circuit adopted and amplified on McMann. The Fourth Circuit thus "expressly disavow[ed] the farce and mockery of justice test," the standard applied by Virginia courts in Slayton v. Weinberger, 213 Va. 690, 194 S.E. 2d 703 (1973).

The trial court apparently did not perceive any difference between the two standards, and concluded that, "under the standard pronounced by either court, petitioner received adequate assistance of counsel." (Findings of Fact, at 2)

Petitioner alleges that the trial court committed at least one of two errors in assessing whether Petitioner received effective assistance of counsel:

1. The trial court did not understand the difference between the McMann "range of competence" test and the "farce and mockery of justice" test, and so did not apply the proper law to the facts of the case; or

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2. If the trial court properly understood the McMann standard, it did not properly apply that standard to the facts of this case.

Application of the "normal competency" test is contextual and depends upon the circumstances of each case. One special factor in the present case is the crime with which the defendant is charged--capital murder. The adequacy of representation by Petitioner's trial attorneys must be assessed in light of the special duties assumed by counsel representing capital defendants.

> '[T]he penalty of death is qualitatively different' from any other sentence. . . . [T]his qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed.

Lockett v. Ohio, 438 U.S. 586, 604 (1978), quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976). Because the death penalty is "so profoundly different from all other penalties," id., at 604, the "range of competence" must be decidedly narrower than in other criminal cases in which the defendant's life does not hang in the balance. Some of defense counsel's customary duties take on special significance in capital cases; jury selection is an obvious example, see Witherspoon v. Illinois, 391 U.S. 510 (1968). The unique bifurcated sentencing process itself requires counsel to become sufficiently knowledgeable about psychology and forensic psychiatry to prepare an evidentiary case in mitigation, and to challenge the accuracy and materiality of evidence introduced by the Commonwealth at the sentencing phase. See Gardner v. Florida, 430 U.S. 349, 356 (1977).

In light of the "greater degree of reliability" called for in capital sentencing, this Court must be especially sensitive to claims of inadequate representation by counsel. Petitioner does not argue that the Court should establish two different standards of competence, one for capital cases, and one for non-capital cases. Instead Petitioner urges the Court to

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recognize that a capital murder case requires competent performance of a variety of tasks beyond those required in cases involving less serious offenses.

In the present case, counsel made several important errors which were "so flagrant that a court can conclude that [they] resulted from neglect or ignorance rather than from informed, professional deliberation." Marzullo, supra, at 544. Moreover, counsel failed to perform adequately certain tasks which have special significance in a capital sentencing trial. Petitioner contends that these deficiencies each provide independently sufficient grounds for setting aside the conviction or sentence on the grounds of inadequate representation of counsel. However, whether or not these claims are independently sufficient, they demonstrate, in the aggregate, that counsel's efforts were not within the range of competence demanded of attorneys in criminal cases, much less within the range of competence demanded of attorneys in capital cases.

In his Findings of Fact and Conclusions of Law, Judge Carneal considered each of Petitioner's allegations and concluded that he had "received adequate assistance of counsel" under the "normal competency" standard adopted by the Fourth Circuit in Marzullo, as well as under the "farce" standard of Slayton v. Weinberger, 213 Va. 690, 694 (1973). Petitioner's claims should be independently reviewed by this Court since Judge Carneal's conclusions represent erroneous determinations on questions of law or mixed questions of law and fact.

B. COUNSEL FAILED TO PROTECT PETITIONER'S FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION IN CONNECTION WITH STATEMENTS MADE DURING PRETRIAL PSYCHIATRIC EXAMINATIONS AND SUBSEQUENTLY USED BY THE COMMONWEALTH AS PART OF ITS CASE-IN-AGGRAVATION AT THE SENTENCING PHASE OF TRIAL.

The trial record and the testimony at the evidentiary hearing show that Mr. Pugh made the decision to seek psychiatric evaluation, and advised Petitioner regarding his conduct during

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these evaluations. The record also shows that Mr. Pugh never appreciated the serious and patent conflict between his efforts to explore possible psychiatric "defenses," in exculpation or mitigation, and his advice to Petitioner to remain silent regarding the circumstances of the offense and any prior offense, (HT. 248).

Mr. Pugh testified that the circumstances of Petitioner's alleged offense and his demeanor alerted him immediately to the need for a comprehensive psychiatric evaluation of Petitioner's personality and mental condition at the time of the alleged offense (HT. 232-34). He therefore sought the evaluation at Central State Hospital and, dissatisified with the results of this evaluation, he requested another evaluation by Dr. Pile (HT. 243-44).

Yet, at the same time, Mr. Pugh said he had advised Petitioner not to discuss the offense or any prior offenses "with anyone" (HT. 236). Although it is not clear whether Mr. Pugh specifically advised Petitioner to remain silent regarding these possibly incriminating matters before each of the respective examinations, he testified that his general advice had been for Petitioner to remain silent and that he did not expect Petitioner to discuss the offense or prior offenses with either examiner (HT. 236-37, 246-47). To be sure that Petitioner would remain silent, Mr. Pugh should have given him careful and explicit advice immediately prior to the examinations. This was especially true with regard to Dr. Pile's examination, since Mr. Pugh knew that Petitioner had been totally open with Dr. Dimitris (HT. 246). Yet Mr. Pugh did not communicate with his client before Dr. Pile's examination, did not accompany him there, and did not discuss the matter with Dr. Pile to clarify the purposes and scope of the evaluation (HT. 246-7, 249).

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Most importantly, Mr. Pugh did not recognize the inconsistency between his advice, had it been followed, and his efforts to explore possible psychiatric defenses. He testified at the evidentiary hearing that it had not occurred to him that it is not possible[1] for a psychiatric examiner to render an opinion regarding a person's mental state at the time of an alleged offense if the defendant refuses to discuss the offense at any prior related conduct (HT. 237-38, 248). Had he realized this, he would undoubtedly have considered seeking a protective order from the court to enable him to investigate possible "defenses"--in exculpation or mitigation--based on psychological abnormality without sacrificing or compromising his client's Fifth Amendment rights (HT. 251-52). Appreciation of this dilemma, and efforts to resolve it, would be expected as being "within the range of competence demanded of attorneys in criminal cases," Marzullo, supra, at 547, especially in capital cases. Conversely, failure to recognize the problem, and, therefore, to take any steps to resolve it, constitutes an "error so flagrant that a court can conclude that it resulted from neglect or ignorance rather from informed professional deliberation." Id. at 544.

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[1]It is clear that a forensic psychiatrist cannot render an informed opinion about a particular defendant's mental functioning at the time of an offense if the defendant declines to discuss his recollection about the circumstances before, during and after the offense. Dr. Showalter so testified (HT. 79-80). See also Gibson v. Zahradnick, supra, at 79. It is possible, however, for an examiner to determine, on the basis of history and a clinical interview, whether or not the defendant exhibits any signs of gross psychopathology. Thus, even if the defendant does not discuss the circumstances of the offense, it is possible in many cases to rule out a mental disease or defect which is prerequisite to assertion of an insanity defense. This was the import of Dr. Dimitris' testimony at the evidentiary hearing. (HT. 180-82) On the other hand, unless the defendant discloses the circumstances of the offense, an examiner will not have enough information on which to base an expert opinion regarding a defendant's actual functioning at the time of the offense. In the absence of such an opinion, a defendant has no prospect of establishing a psychiatric case-in-exculpation or in mitigation under the capital sentencing provisions.

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C. PETITIONER'S TRIAL ATTORNEYS FAILED TO PREPARE ADEQUATELY FOR CROSS-EXAMINATION OF DR. PILE AT THE SENTENCING STAGE, FAILED TO CONDUCT A COMPETENT CROSS-EXAMINATION, AND QUESTIONED DR. PILE IN A WAY WHICH EVOKED HIGHLY PREJUDICIAL, UNRELIABLE TESTIMONY.

1. Due to inadequate preparation, counsel's cross-examination of Dr. Pile was clearly incompetent.

At the sentencing hearing, the Commonwealth called Dr. Pile only to ask him about Petitioner's statements regarding the school bus incident. The Commonwealth's Attorney did not ask Dr. Pile any questions concerning his diagnosis or his prognosis. Had he done so, an adequately prepared defense attorney would have objected to the admission of such testimony on a variety of grounds:

1. Such conclusions, based entirely on Petitioner's own statements, would violate Petitioner's Fifth Amendment rights for the reasons stated by this Court in Estelle v. Smith, ___ U.S. ___, 68 L.Ed.2d 359 (1981), and implied by the Fourth Circuit in Gibson v. Zahradnick, 581 F.2d 75 (4th Cir., 1978).

2. Since the Petitioner had offered no psychiatric testimony and had not put his own mental condition in issue, either in mitigation or negation of the aggravating circumstances, the testimony was not relevant. See Estelle v. Smith, 68 L.Ed.2d at 371.

3. In light of the unreliability of psychiatric diagnosis of character disorders and the entirely speculative nature of the prediction of future violence, psychiatric opinion testimony is not admissible on this issue.

4. Even if the proffered testimony were not privileged, were relevant and could be the subject of an expert opinion, Dr. Pile would not qualify as an expert to offer such an opinion, because his examination was insufficient and because he was not a forensic psychiatrist.

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Perhaps for these reasons, the Commonwealth Attorney did not question Dr. Pile about his diagnosis. On cross-examination, however, Mr. Pugh stepped into the shoes of the prosecution:

> Q. Doctor Pile, in your diagnosis, what was your diagnosis of Michael Smith?
>
> A. I felt that he was a sociopathic personality, sexual deviation, rape.
>
> Q. What is that?
>
> A. A person who--is also described as an antisocial personality. They're all sort of the same type of--of personality disorder. The basically people who are unsocialized, and they're repeatedly in conflict with the Court. They don't seem to have any capability of--of having loyalty to anybody, to any group or to any social values. Usually, they're rather irresponsible. They seem to feel no guilt, and they don't seem to learn from experience or punishment. They seem to particularly have no feelings or standards of what's right and what's wrong.

(TT. 936-37). It is important to note that Mr. Pugh knew that Dr. Pile's diagnosis was not supported by an adequate evaluation (HT. 251). Asked at the evidentiary hearing why he had nonetheless asked Dr. Pile about his diagnosis, Mr. Pugh could offer no explanation (HT. 258).[2]

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[2]In his Findings and Conclusions, Judge Carneal speculates about possible strategic motivations for Mr. Pugh's questioning of Dr. Pile (pp. 7-8), and suggests that Mr. Pugh may have been attempting to establish that sociopathy constitutes a mitigating mental abnormality under §19.2-264-4(B) and that this condition was treatable. While this may, indeed, have been Mr. Pugh's strategy, minimally adequate preparation would have revealed that sociopaths do not have compulsions to commit crimes, that the condition is not characterized, clinically, as an emotional illness or sickness, and that the general clinical dictum is that sociopaths are not good candidates for therapy. (See Dr. Dimitris' trial testimony, in response to jurors' questions. TT. 952-956). It is abundantly clear from the trial record that there was no conceivable value in Dr. Pile's testimony, and that Petitioner's case-in-mitigation had to be built on Dr. Dimitris' testimony. Judge Carneal's suggestion that aspects of Dr. Pile's testimony "actually weighted in Petitioner's favor" is wholly inconsistent with the jurors' questioning of Dr. Dimitris, and with the closing argument of the Commonwealth's Attorney.

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If Dr. Pile's testimony had been elicited by the prosecution, an adequately prepared defense attorney would have had no difficulty impeaching the witness on cross-examination. Dr. Pile's one-hour interview with Petitioner, not supplemented by other information, was inadequate to provide the necessary clinical predicate for a diagnosis of antisocial personality disorders. Dr. Showalter and Dr. Dimitris, experts in forensic psychiatry, testified at the evidentiary hearing that the information available to Dr. Pile was clinically insufficient to support his diagnosis (HT. 97, 214).[3]

Moreover, Dr. Pile's speculative statements about how sociopaths "usually" behave and about the intractability of the condition (TT. 937) clearly lack a scientific foundation, as Dr. Showalter testified at the evidentiary hearing:

> [t]here is no valid or reliable study that correlates a diagnostic, any diagnostic entity with specific type of deterioration or any particular types of violent acts or dangers.

(T. 92).

Both the psychiatric and the legal literature contain many articles and references discussing the unreliability of predictive statements based on such diagnoses.

In Estelle v. Smith, supra, the prosecution had presented, as part of its case on dangerousness, testimony by a psychiatrist (Dr. Grigson) which was remarkably similar to Dr.

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[3]In his Findings and Conclusions, Judge Carneal stated (p. 8), "As to Petitioner's contention that Dr. Pile's one-hour examination constituted [an] insufficient clinical predicate for his diagnosis, I find that the expert opinion was equivocal and in basic disagreement over this point." Judge Carneal's finding is clearly contrary to the overwhelming weight of the evidence, taken both as a whole (HT. 83-98; 200-214) and in the context of specific questions which squarely posed the question to the two expert witnesses (HT. 96-9 211-214).

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Pile's testimony. Smith v. Estelle, 602 F.2d 694, 697 (5th Cir. 1979), aff'g 445 F. Supp. 647 (N.D.Tex., 1978), aff'd ___ U.S. ___ 68 L.Ed.2d 359 (1981). The Fifth Circuit pointed out the ways in which even a "minimally" prepared attorney might respond:

> [I]t is clear that Smith's defense attorneys--whose actual efforts to impeach Dr. Grigson were at best ineffectual...and sometimes damaging to their client...might, even with minimal preparation, have meet Dr. Grigson's testimony in several ways. Had they been able to do even rudimentary research, they would have learned that a Task Force of the American Psychiatric Association concluded that predictions like Dr. Grigson's are 'fundamentally of low reliability.'

602 F.2d at 699, n.7. The court went on to quote the American Psychiatric Association Task Force on Clinical Aspects of the Violent Individual (1974), which states:

> In summary, the state of the art regarding predictions of violence is very unsatisfactory. The ability of psychiatrists or any other professionals to reliably predict future violence is unproved. Close monitoring, frequent follow-up, and a willingness to change one's mind about treatment recommendations and dispositions for violent persons, whether within the legal system or without, is the only acceptable practice if the psychiatrist is to play a helpful role in these assessments of dangerousness.

There was ample legal literature available at the time of trial discussing the unreliability of such statements concerning future violence. See, e.g., Dix, Administration of the Texas Death Penalty Statutes: Constitutional Infirmities Related to the Prediction of Dangerousness, 55 Tex.L.Rev. 1343 (1977); Dix, The Death Penalty, Dangerousness, Psychiatric Testimony and Professional Ethics, 5 Am. J. Crim. L. 151 (1977); Diamond, The Psychiatric Prediction of Dangerousness, 123 U. Pa.L.Rev. 439 (1975). Many more authorities are cited in Smith v. Estelle, 602 F.2d at 699, n.7; many of those authorities would have been available to counsel, had counsel looked.

A review of any basic psychiatry text would have exposed the insufficiency of the clinical predicate for Dr.

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Pile's diagnosis of sociopathy. See, e.g., Winoker and Crowe, Personality Disorders, in 2 Comprehensive Textbook of Psychiatry 1279, 1294 (A. Freedman, et al., eds.)(2d Ed. 1975). However, Mr. Pugh testified that no member of the defense team ever reviewed any psychiatric literature (T. 274); they did nothing to prepare their cross-examination of the two psychiatrists.

In Smith v. Estelle, supra, at 701, the Fifth Circuit Court commented that Dr. Grigson's "surprise" testimony regarding his diagnosis of sociopathy carried "no assurance of reliability whatsoever" because it was not effectively cross-examined (an issue not reached in this Court's opinion). Thus, the court held that it was error to admit such testimony when offered by the prosecution. It follows, as the district court in Smith v. Estelle observed, that if admitting Dr. Grigson's testimony was not error, defense counsel provided ineffective assistance in failing to impeach it on cross-examination. 445 F. at 658 n.16. In Petitioner's case, defense counsel's representation was flagrantly inadequate because they elicited this highly prejudicial, unreliable testimony themselves. Adequately prepared counsel would have asked Dr. Pile no questions at all. Instead, Petitioner's counsel attempted, without any preparation, to cross-examine an expert witness in an area with which he was altogether unfamiliar.

In sum, the decision to cross-examine Dr. Pile without having researched ways to impeach his testimony is itself an error "so flagrant that a court could conclude that it resulted from neglect or ignorance rather than from informed, professional deliberation." Marzullo, supra, at 544. Similarly, counsel's decision to "cross-examine" Dr. Pile by asking him exactly those questions which would have been objectionable had they been asked by the Commonwealth's Attorney is a mistake with no possible strategic motivation. It, too, was an error of neglect or ignorance rather than an error of informed, professional

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deliberation. Counsel's efforts were clearly not within the range of competence of criminal lawyers, and Petitioner was denied effective assistance of counsel.

2. Counsel's incompetent cross-examination was demonstrably prejudicial.

The trial record demonstrates clearly that the jury relied on Dr. Pile's testimony and was encouraged to do so by the Commonwealth's Attorney, who emphasized to the jury that defense counsel had himself elicited this damaging testimony.

> Now Dr. Pile was asked, I didn't ask him. All I asked him was about the acts that were committed on the bus. Mr. Wood and Mr. Pugh asked him about his diagnosis. Certainly Dr. Pile and Dr. Dimitris agreed on the diagnosis. I didn't ask Dr. Pile what his diagnosis was, they did...

(TT. 1072-73). The Commonwealth's Attorney cited Dr. Pile's testimony, and argued that this evidence would be enough, on its own, to warrant imposition of the death penalty (TT. 1073-74).

The jury was obviously extremely interested in the different prognostic implications of the diagnoses of inadequate personality and sociopathic personality; Juror Renz (TT. 952, 958) and Juror Robertson (TT. 954-55) interrupted Dr. Dimitris' testimony to ask about the diagnoses. This demonstrated interest strongly suggests that Dr. Pile's unreliable diagnosis, incompetently elicited by Petitioner's counsel on cross-examination, played a determinative role in the jury's deliberations. Instructed by the court to return specific factual findings with respect to the statutory aggravating circumstances (TT. 1093), the jury clearly found the aggravating circumstance of "dangerousness." This is clear because the jury did not strike out dangerousness on the verdict form, even though it did delete the circumstance of "depravity of mind" (TT. 1102-03). Also, the persistent questions from the jurors during the hearing and during the deliberations (regarding the incapacitative consequences of a life sentence) demonstrate that

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the dangerousness factor also played a conclusive role in the jury's decision "to recommend" the death penalty.

It is conceivable, of course, that the jury would have imposed the death penalty even had it not found the defendant "dangerous." However, in light of the prosecution's closing argument and the jurors' questions, this Court must assume, at the least, that its findings of dangerousness tipped the balance between mitigating and aggravating circumstances, leading to the jury's decision "to recommend" the death penalty. In short, this Court must assume that the sentence of death was based, to a determinative degree, on its findings of dangerousness, findings clearly influenced by Dr. Pile's incompetent and unreliable testimony.

D. COUNSEL FAILED TO CONDUCT AN ADEQUATE INVESTIGATION CONCERNING THE ONLY AVAILABLE 'DEFENSE' IN THE CAPITAL SENTENCING PHASE OF HIS TRIAL--WHETHER THE PETITIONER SUFFERED FROM MITIGATING MENTAL ABNORMALITIES AS SET FORTH IN VA. CODE ANN. §19.2-264.4(B).

In most capital cases, the defendant's sole "defenses" at the capital sentencing phase of this trial are likely to be the mitigating mental abnormalities defined in Va. Code Ann. §19.2-264.4(B). The threshold of clinical and legal significance of mitigating mental abnormality is much lower in this contest than it is for legal insanity under the M'Naghten and irresistible impulse rules. Neither of the two mitigating circumstances specified in the statute requires a "mental disease or defect":

> 1. Whether "the capital felony was committed under the influence of extreme or emotional disturbance"; or
>
> 2. "Whether, at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was significantly impaired."

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These two clinical questions, based on the American Law Institute's Model Penal Code, §210.6 (Official Draft 1962), have no parallel in any other area of the criminal law in Virginia.

Recognizing the need for psychiatric testimony in mitigation, trial counsel arranged for two psychiatric evaluations, by the Forensic Unit at Central State Hospital and by Dr. Wendell Pile. However, neither examiner was requested, by the court or counsel, to address these two key questions arising under the capital sentencing statute.

The staff at Central State was initially ordered to evaluate only Petitioner's competency to stand trial; upon written request of the Commonwealth's Attorney and verbal request of defense counsel, Dr. Dimitris also expressed an opinion regarding Petitioner's sanity at the time of the offense. Dr. Dimitris and Mr. Pugh both testified that the provisions of the capital sentencing statute were not brought to Dr. Dimitris' attention until the day of the sentencing trial, and even then the focus was on dangerousness, and not mitigation (HT. 190, 242).

By court order dated September 28, 1977, Dr. Pile was requested to evaluate Petitioner's "mental condition . . . at the time of the alleged offense and his mental condition at the time of the examination." Dr. Pile and Mr. Pugh both testified that neither of Petitioner's attorneys discussed the purpose of the evaluation with him at any time, either before or after Petitioner was examined on October 1 (HT. 22, 249). Dr. Pile also testified that the provisions of the capital sentencing statute were never brought to his attention (HT. 22).

Dr. Showalter testifed that, in order to develop an expert opinion on these mitigating mental abnormalities, he must conduct a more extensive evaluation than that required to determine sanity or competency (HT. 128-30). By their failure to request either psychiatric examiner to direct his clinical

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attention to the statutory mitigating abnormalities, counsel made it impossible to investigate and prepare a case in mitigation, compromising Petitioner's right to explore and present a "defense" based on mental abnormality. The Fourth Circuit has long held that a competent attorney "must conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed. . ." Coles v. Peyton, 389 F.2d 224, 226 (4th Cir. 1968).

This rule has recently been applied in two habeas proceedings voiding convictions under the Sixth and Fourteenth Amendments because counsel had failed to explore possible defenses of insanity.[4] In one case, Wood v. Zahradnick, 578 F.2d 980, 982 (4th Cir. 1978), the attorney had failed to obtain any psychiatric evaluation of the possible existence of alcohol psychosis at the time of a rather bizarre offense. Judge Haynesworth stated tht the defendant's Sixth Amendment right to effective assistance imposes a

> correlative duty on defense counsel to undertake reasonable steps to investigate all open avenues of defense. The circumstances [here] clearly suggested that an exploration of his mental condition was such an avenue.

Similarly, in Brennan v. Blankenship, 472 F. Supp. 149 (W.D.Va. 1979), a conviction for malicious wounding was set aside in a habeas proceeding because counsel failed to pursue a possible insanity defense. The District Court ruled that "the failure to pursue the possible tactical advantage" provided by a

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[4]For the purposes of this argument, the law of the Fourth Circuit will be used. This Court has not amplified on the meaning of McMann v. Richardson, supra, and the Fourth Circuit has had many occasions in recent years to discuss the same issues. Furthermore, although Virginia lawyers arguably cannot be held to be familiar with decisions from, for example, the Ninth or Tenth Circuits, they certainly should be familiar with important precedents in the Fourth Circuit. Also, if the "normal range of competence" varies among regions of the country, as might a legal malpractice standard, then the Fourth Circuit opinions serve as a benchmark of the standard of practice in the area covered by the Fourth Circuit.

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psychiatrist's testimony, which indicated that the defendant was psychotic on the day of the shooting, "constituted a professional omission of critical magnitude." Id. at 158. Wood and Brennan indicate that an attorney's failure adequately to explore and present a "defense" of mitigating mental abnormality constitutes ineffective assistance of counsel.

As both Dr. Showalter and Dr. Dimitris noted, the subtle distinctions of the statute require a more detailed and more sophisticated examination than that normally conducted to determine whether the defendant is legally insane. The symptomatology of a defendant who is legally insane is rarely subtle, particularly as the standard is defined and applied in Virginia. Indeed, most psychiatrists and attorneys believe that the defendant must be psychotic (grossly out of touch with reality) to be legally insane. Goldstein, The Insanity Defense, 69 (1967). See, e.g., Thompson v. Commonwealth, 193 Va. 704 (1952); David v. Commonwealth, 214 Va. 681 (1974).

In Petitioner's case, neither examiner was requested to focus his attention on the range of psychological factors that might be relevant to the existence of extreme emotional disturbance or to any non-psychotic impairment of Petitioner's ability to conform his conduct to the requirements of the law. It is clear from the record that neither examiner did so. Counsel had not discussed the meaning of those mitigating factors, which were concepts that were unkown to the psychiatrists. In fact Dr. Pile testifed at the evidentiary hearing that he believed that the mitigating circumstances under the capital sentencing statute were interchangeable with the M'Naghten inquiry (HT. 48). He had never been told otherwise.

Thus, in failing to adequately investigate a case-in-mitigation based on mitigating mental abnormality, as defined by §19.2-264.4(B), counsel failed to perform adequately one of the absolutely essential tasks in the representation of a defendant

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charged with a capital offense and, hence, fell outside the "range of competence demanded of attorneys" in similar cases.

CONCLUSION

Petitioner was denied his right to the adequate and effective assistance of counsel at and in connection with his capital sentencing hearing. Counsel did not take obvious and necessary steps to protect Petitioner's Fifth Amendment privilege against self-incrimination, particularly in regard to statements made by Petitioner to Dr. Pile. Counsel knew that Dr. Pile would be testifying, but did not adequately prepare a cross-examination of Dr. Pile. They consulted no psychiatric texts, and did not realize that the examination by Dr. Pile was clinically inadequate to support the conclusions drawn by Dr. Pile. Counsel failed to be sure that either Dr. Dimitris or Dr. Pile knew about the mitigating mental abnormalities under Virginia law; no effort was made to develop a case in mitigation based on either of those mitigating mental abnormalities. Not only did counsel fail to impeach or in other ways effectively cross-examine Dr. Pile; counsel elicited testimony which no prosecutor would have been permitted to elicit--so called "expert testimony" on future dangerousness.

For all of the above-stated reasons, the assistance afforded Petitioner by counsel was not "within the range of competence demanded of attorneys in criminal cases." McMann v. Richardson, 397 U.S. 759,770-71 (1970), in violation of the Sixth and Fourteenth Amendments to the United State Constitution. Petitioner prays this Court to grant his Petition for a Writ of Certiorari to the Supreme Court of Virginia, and to review his claims on their merits.

MICHAEL MARNELL SMITH

By Counsel

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MAILING CERTIFICATE

I, F. Guthrie Gordon, III, a member of the Bar of this Court, make oath that, on or before September 10, 1981, I caused this Petition for Writ of Certiorari, along with the accompanying Motion to Proceed In Forma Pauperis and the Supporting Affidavit, to be deposited in a United States Post Office or mailbox, with first class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, pursuant to Rule 28.2. I further make oath that I caused one copy of each of the above-mentioned documents to be sent to the Honorable James E. Kulp, Deputy Attorney General for the Commonwealth of Virginia, 900 Fidelity Building, 830 East Main Street, Richmond, Virginia, 23219, by depositing the documents in the United States Post Office or mailbox, with first class postage prepaid.

F. Guthrie Gordon, III

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NOTARIAL CERTIFICATE

STATE OF VIRGINIA

AT LARGE, to-wit:

The foregoing instrument was subscribed and sworn before me on this 10th day of September, 1981, by F. Guthrie Gordon, III.

Trisha A Krueger
Notary Public

My commission expires: June 26, 1982

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Supreme Court, U.S.
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81-5390

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VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF WILLIAMSBURG AND COUNTY OF JAMES CITY

MICHAEL MARNELL SMITH, Petitioner	)	FINDINGS OF FACT
	)	
V.	)	AND
	)	
EDWARD C. MORRIS, SUPT. MECKLENBURG CORRECTIONAL CENTER, Respondent	)	CONCLUSIONS OF LAW

On November 2, 1977, petitioner Michael Marnell Smith was convicted by a jury of capital murder following rape under Va. Code Ann. § 18.2-10(a) and -31(e) (Cum. Supp. 1977). On November 3, 1977, pursuant to the bifurcated capital trial proceedings prescribed by Va. Code Ann. § 19.2-264.2 et seq. (Cum. Supp. 1977), the jury recommended the sentence of death, which, after review, was imposed by this Court on November 30, 1977. The conviction and sentence were unsuccessfully appealed. Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978); cert. denied, ___U.S.___, 99 S.Ct.2419, (1979). On June 22, 1979, petitioner filed a writ of habeas corpus with this Court, alleging ineffective assistance of counsel during his trial. For the reasons set forth below, the petition is denied.

As a predicate to his claims of inadequate assistance of counsel, petitioner urges this Court to adopt a standard of competency applicable to capital cases which is decidedly narrower than that applied to other criminal cases. While it is true, as petitioner asserts, that jury selection takes on great significance in a capital case, and that a separate evidentiary case must be prepared for the sentencing phase of the capital trial, the special tasks involved in such a case have been found to be within the competence required of counsel in other criminal trials. Alderman v. State, 241 Ga. 496, 246 S.E.2d 642 (1978); Earvin v. State, 582 S.W.2d 794 (cr. App. Tex. 1978). Noting that petitioner cites no holdings to the contrary, and finding no indication that special qualifications beyond those in normal criminal trials are required of counsel in the bifurcated capital

trial; I conclude that the standards of competency applicable to other criminal cases also apply to the capital case.

Thus, it would appear that petitioner's claims rest on the standard set forth in Slayton v. Weinberger, 213 Va. 690, 194 S.E.2d 703 (1973), where incompetent representation of counsel was said to occur "only in those extreme instances where the representation is so transparently inadequate as to make a farce of the trial." Id. at 705. Petitioner, however, bases his claim on the standard in Marzullo v. Maryland, 561 F2d 540 (4th Cir. 1977), which states that inadequate representation results from conduct "so flagrant that a court could conclude that [such conduct] resulted from neglect or ignorance rather than from informed, professional deliberation." Id. at 548. Resolving any difficulties arising from differences in the language employed by the two courts above, I conclude that under the standards pronounced by either court, petitioner received adequate assistance of counsel.

I

Petitioner's first claim centers on the admissibility during the sentencing phase of the trial of certain statements he made during a pretrial psychiatric examination. On October 1, 1977, by order of this Court pursuant to petitioner's request for an evaluation by a psychiatrist of his own choosing, petitioner underwent a one-hour psychiatric examination by Dr. Wendell Pile. In a letter to this Court dated October 1, 1977, Dr. Pile described an account by petitioner of a previously undisclosed incident which occurred in his youth. The letter relates that petitioner, a school bus driver at the time, once tore the clothes off a girl, but on second thought, decided not to rape her. At the sentencing phase of the trial, petitioner's counsel objected to an attempt by the prosecution to elicit on direct examination this account by Dr. Pile on the grounds that during the examination Dr. Pile failed to inform petitioner that his

statements could be used against him. This Court overruled, noting that Dr. Pile's examination occurred at petitioner's request.

Referring to the psychiatric examination itself, Dr. Pile, at the beginning of said examination, encouraged petitioner to make a full disclosure of the offense and any prior offenses. Petitioner advised Dr. Pile that his attorney had told him not to discuss the offense or any prior offenses in which he had been involved. Thereafter, Dr. Pile did not press petitioner for information, but during the interview petitioner told Dr. Pile of the incident on the bus as recited above.

Thus, the Court finds that petitioner was carefully advised by his attorney not to discuss the offense with anyone and also not to divulge anything about prior offenses, that petitioner was fully aware of this advice when he was examined by Dr. Pile and exhibited such knowledge when he advised Dr. Pile that his attorney had told him not to discuss any past offenses, and that petitioner voluntarily waived his right against self-incrimination.

Turning now to the case law discussed by petitioner in support of his first claim, petitioner refers to two recent decisions dealing with the issue raised. The first case, Gibson v. Zahradnick, 581 f.2d 75 (4th Cir. 1978) overturns the decision in Gibson v. Commonwealth, 216 Va. 412, 219 S.E.2d 845 (1975), in which the Supreme Court of Virginia held that the prosecution may use on the issue of guilt statements made without prior warning during a psychiatric examination, so long as the accused was not compelled to answer questions concerning the offense with which he was charged. The court in Gibson v. Zahradnick, supra, disagreed, reasoning that an adequate evaluation of an accused's sanity at the time of the offense or of his competency to stand trial cannot be made absent a candid disclosure to the examiner of the facts surrounding the offense. Thus, the court held that in order to preserve his Sixth Amendment right to explore these psychological defenses, the incriminating statements an accused makes concerning the offense may not be used by the prosecution

to prove his guilt. To adapt this holding to the present case, petitioner analogizes that proof of guilt in a normal criminal trial is the functional equivalent of the prosecution's proof of case-in-aggravation in the sentencing phase of a capital trial.

The second case, Smith v. Estelle, 602 F.2d 694 (5th Cir. 1979), involves the introduction of psychological testimony during the sentencing phase of a bifurcated capital trial. There, on the trial court's motion the prosecution obtained a psychiartic examination of the accused, but failed to inform him before or during the examination of his Fifth Amendment right against self incrimination. Having never disclosed the existance of this examination to the defense, the prosecution called the psychiatrist to testify on the issue of dangerousness in support of the state's case-in-aggravation. The court, supra, held the testimony inadmissible on two grounds: first, its introduction constituted unfair surprise, and second, in the absence of a warning against self-incrimination, the accused made no voluntary waiver of his Fifth Amendment rights.

Focusing on the merits of the first claim, I find that neither decision above adequately supports petitioner's claim such that there would be a reasonable and sufficient certainty of success on appeal. Gibson v. Zahradnick, supra, narrowly considers the admissibility of statements relating directly to the circumstances of the offense charged, and their use by the prosecution to prove guilt. It does not consider the use of statements to prove mental state, nor does it draw the analogy between proof of guilt and proof of case-in-aggravation.

Further, since unfair surprise is not in issue in the present case, Gibson v. Zahradnick forecloses further argument based on Smith v. Estelle, supra. The alternative analysis employed in Smith v. Estelle with regard to the admissibility of incriminatory statements is the same Fifth Amendment voluntariness of waiver analysis that the Supreme Court of Virginia employed in Gibson v. Commonwealth, supra, and which was ultimately rejected in Gibson

v. Zahradnick. The court in Gibson v. Zahradnick reasoned instead that the Sixth Amendment right to explore psychological defenses demands a full inquiry, uncompromised by the threat of self incrimination, into defendant's mental state. The court's holding that the prosecution is prohibited from using such incriminatory statements to prove defendant's guilt was based on a finding that defendant's Sixth Amendment rights were violated, and not on a finding of absence of voluntary waiver.

More importantly, however, both Gibson v. Zahradnick and Smith v. Estelle were decided after petitioner's trial. Thus, regardless of their usefulness in theory to sustain an appeal, neither was in fact available to counsel when needed. Further, testimony shows that an assistant of counsel conducted research on the Fifth Amendment issue, but that his unpromising results led counsel to decide not to appeal. [Evidentiary hearing tr. at 270 and 274.] In light of these facts and of the differences noted above, I find sufficient reason for counsel not to have raised on appeal the arguments presented here. I thus conclude that counsel exercised reasonable judgment in deciding not to preserve the objection on appeal, and that this decision resulted from informed, professional deliberation in conformity with the standards of competence discussed above.

In another claim relating to statements made during the psychiatric examination, petitioner contends that his counsel incompetently failed to recognize the conflict between his advice to petitioner to remain silent about the offense charged and his attempt through psychiatric examination to explore possible psychological defenses. Petitioner's claim presumes that such defenses cannot be probed in the absence of statements by the accused concerning the circumstances surrounding the offense. On this issue, the opinions of expert witnesses were in opposition [Evidentiary hearing tr. at 80 and 180 - 182], as appear to be the underlying presumptions in the decisions of Gibson v. Zahradnick

and Smith v. Estelle, discussed supra. I find adequate support for counsel's conduct within the present state of disagreement, both in the medical and legal professions, on this matter. I thus conclude that counsel's advice to petitioner to remain silent about the offense during his psychiatric examinations was not inadequate representation under the Slayton or Marzullo standards quoted above.

II

Petitioner's second claim relates to his counsel's cross examination of Dr. Pile during the sentencing phase of the trial. On cross, petitioner's counsel, after a few preliminary questions, asked Dr. Pile for his diagnosis of petitioner's mental condition. The doctor responded "I felt he was a sociopathic personality, sexual deviation, rape." [Trial tr. at 936.] Petitioner notes that his counsel testified that he was "shocked" upon first reading this diagnosis in Dr. Pile's October 1, 1977 letter to this Court [Evidentiary hearing tr. at 250], that counsel testified that he entertained doubts about the adequacy of Dr. Pile's evaluation based on a one-hour examination [Evidentiary hearing tr. at 251], and that counsel was later uncertain why he had asked for Dr. Pile's diagnosis on cross examination [Evidentiary hearing tr. at 255 and 258]. From this testimony, petitioner contends that his counsel incompetently asked questions which were damaging and void of strategic purpose.

Petitioner further refers to expert opinion [Evidentiary hearing tr. at 90], medical literature, and dicta in Smith v. Estelle, supra, for the proposition that Dr. Pile's one-hour examination was insufficient to establish a diagnosis of sociopath, and that a minimum of research would have provided his counsel with authority discrediting the predictive value of a medical prognosis of future criminal conduct. Noting that petitioner's counsel testified that he had done no research in connection with the cross examination of Dr. Pile [Evidentiary hearing tr. at

274], petitioner contends that his counsel inadequately prepared for the cross examination.

Petitioner finally asserts that Dr. Pile's testimony prejudiced the jury, noting that two jurors inquired about the characteristics of the sociopathic personality [Trial tr. at 952 - 955], that the prosecution referred to Dr. Pile's diagnosis in its closing argument [Trial tr. 1072 and 1073], and that the jury did not delete the finding of "dangerousness" from its verdict recommending the death sentence.

While petitioner's counsel may have been uncertain at the evidentiary hearing why he questioned Dr. Pile as he did, I find that the trial transcript adequately explains the reasons behind his inquiries. During his cross examination of Dr. Pile, petitioner's counsel inquired as to 1) whether sociopaths have compulsions to commit crimes [Trial tr. at 937], 2) the causes of the sociopathic personality [Trial tr. at 940], 3) the length of time it takes to develop such a condition [Trial tr. at 937], 4) whether the condition could be categorized as an emotional illness or sickness [Trial tr. at 937], and 5) whether such a condition can be treated [Trial tr. at 938 and 939]. In addition, during his closing statement petitioner's counsel argued that petitioner was suffering from an illness that he could not help [Trial tr. at 1082 and 1083] and asked the jury to give him the opportunity to obtain treatment [Trial tr. at 1084 and 1086], which the Court finds to be reasonable trial strategy in light of the confession of the petitioner and the overwhelmingly aggravating facts exhibited by testimony in the case.

I find that through this line of questioning, which was repeated on the cross examination of Dr. Dimitris, who had also examined petitioner [Trial tr. at 948, 950 and 951], petitioner's counsel attempted to establish the statutory mitigating factor of extreme mental or emotional disturbance, Va. Code Ann. § 19.2-264.4(B) (Cum. Supp. 1977), his only reasonable defense. Counsel was constrained to prove that petitioner's mental condition was

defective. I find that counsel elicited Dr. Pile's testimony in an effort to establish that petitioner was suffering from a mental illness which could be treated. The necessity of placing petitioner's mental state in question, not counsel's incompetence, produced the prejudicial statements. In Reynolds v. Mabry, 574 F.2d 978 (8th Cir. 1978), the court recognized that the introduction of prejudicial testimony in proof of an insanity defense does not by itself constitute inadequate representation of counsel.

Furthermore, Dr. Pile's testimony was not entirely prejudicial or void of strategic value. On the crucial question of the likelihood of future criminal conduct, Dr. Pile's testimony that in certain cases a sociopathic personality can be treated actually weighed in petitioner's favor [Trail tr. at 938]. I thus conclude that counsel's cross examination was the product of informed, professional deliberation, and thus competent under the standards discussed supra.

As to petitioner's contention that Dr. Pile's one-hour examination constituted insufficient clinical predicate for his diagnosis, I find that the expert opinion was equivocal and in basic disagreement over this point [Evidentiary hearing tr. at 86, 90, 204 and 205]. Further, authority questioning the validity of psychiatric predictions of future criminal behavior, while promising for impeachment purposes, would only have undermined Dr. Pile's favorable testimony concerning the possibility of treatment. I conclude then that counsel was competent in not raising these matters during the trial.

III

Petitioner contends that counsel failed to conduct an adequate investigation of the statutory defense of mitigating mental abnormality. Va. Code Ann. § 19.2-264.4(B) (Cum. Supp. 1977). Petitioner refers to United States v. Walker, 537 F.2d 1192 (4th Cir. 1976), and United States v. Taylor, 437 F.2d 371 (4th Cir. 1971), for the proposition that a psychological evaluation per-

formed for one purpose is not sufficient for another purpose, and asserts that since the examining psychiatrists were only requested to evaluate petitioner with regard to his competency to stand trial and to his sanity at the time of the offense, the scope and focus of their investigations were inadequate to explore the statutory mitigating mental conditions. From this, petitioner claims that counsel failed to take adequate steps to prepare the case-in-mitigation, and concludes from the decisions of Wood v. Zahradnick, 578 F.2d 980 (4th Cir. 1978), and Brennan v. Blankenship, 472 F. Supp. 149 (W.D. Va. 1979), that counsel's conduct was incompetent.

United States v. Walker, supra, and United States v. Taylor, supra, hold that an examination sufficient to determine competency to stand trial will not serve for an examination sufficient to determine sanity at the time of the offense. The cases note that the former examination requires only a limited investigation of defendant's present state of mind, while the latter requires analysis of defendant's personality at the time of the offense. I do not find, however, that such a difference exists between the examinations petitioner received and an examination sufficient to explore the statutory defenses under Va. Code Ann. § 19.2-264.4(B) (Cum. Supp. 1977).

The mitigating mental factors to be considered under the statute revolve around petitioner's mental state at the time of the offense, a question on which both examinations focused. On this point, both examining doctors testified that their examinations were sufficient to render an opinion concerning the statutory mitigating mental conditions [Evidentiary hearing tr. at 31 and 215]. I thus find that petitioner was adequately examined with regard to the statutory defenses.

Petitioner's use of Wood v. Zahradnick and Brennan v. Blankenship, supra, is inapposite here since both decisions rest on a complete failure to explore available psychological defenses. In addition, in light of the testimonies of the examining psychiatrists that no evidence was found to support a

defense of mitigating mental conditions [Evidentiary hearing tr. at 32, 215 and 216], I find that petitioner suffered no prejudice from counsel's failure to direct the psychiatric examinations toward these issues. I thus conclude by the standards quoted above that counsel conducted a competent investigation of mitigating mental circumstances.

IV

Petitioner's fourth claim asserts that during the sentencing phase of the trial counsel failed to prepare and request adequate jury questions regarding 1) the meanings of the terms "probability" and "serious act of criminal violence" as found in Va. Code Ann. § 19.2-264.4(C) (Cum. Supp. 1977), 2) the parole guidelines employed in the release of a prisoner incarcerated for life, and 3) the credibility of witnesses, the burden of proof, and the meaning of the term "beyond a reasonable doubt."

In regard to the first of these, the Supreme Court of Virginia has determined that definitional instructions are not necessary for the jury's comprehension of the terms in § 19.2-264.4 (C). Clark v. Commonwealth, 220 Va. ___, 257 S.E.2d 784 (1979). Counsel cannot be incompetent for failing to request an unnecessary instruction. The second of the above instructions was found to constitute reversible error in Hinton v. Commonwealth, 219 Va. 492, 247 S.E.2d 704 (1978). Failing to request an erroneous instruction is not inadequate representation. Concerning the last of these, I find that the jury was adequately informed of the concepts and terms requested, since instructions had been given on each of them during the guilt phase of the trial, which had concluded the day before. I therefore reach the conclusion that petitioner's counsel rendered adequate assistance under the standards enunciated above in not requesting the above instructions during the sentencing phase of the trial.

V

Petitioner's fifth contention relates to counsel's pre-

trial representation. Petitioner maintains that counsel took a perfunctory approach to the investigation of prospective jurors, failed to make an adequate survey of community attitudes relating to jury selection and change of venue, and put forth an inadequate presentation in support of the alternative motions for change of venue or venire.

First, the record shows that counsel conducted research in order to formulate the questions asked on voir dire [Evidentiary hearing tr. 228], and that counsel discussed among themselves the list of prospective jurors, many of whom counsel know personally. I find this to be an adequate jury investigation. Second, testimony indicates that counsel canvassed for local opinion at shopping centers [Evidentiary hearing tr. at 231], and spoke with numerous people to obtain affidavits [Evidentiary hearing tr. at 230], all in an effort to gather evidence in support of a motion for change of venue or venire. I find that the survey counsel conducted was adequate. Third, the record shows that on August 24, 1977 counsel filed with this Court a motion for change of venue or venire supported by affidavits, newspaper articles, and radio broadcast summaries, and that on October 24, 1977 counsel renewed that motion, again providing affidavits and newspaper clippings. This presentation, too, is adequate. I conclude, therefore, that counsel's pretrial conduct was competent under the standards discussed above.

VI

Petitioner claims that his counsel rendered inadequate assistance during the guilt phase of the trial by failing to object to a jury instruction concerning intent. Petitioner cites numerous decisions finding that similar instructions violate the Fourteenth Amendment. I note, however, that the instruction given is still found in the Virginia Model Jury Instructions - Criminal, Vol. 1. p. 39 (1979), and has been in use in Virginia for years. Furthermore, the instruction had not been declared

unconstitutional in Sandstrom v. Montana, ___U.S.___, 99 S. Ct. 2450 (1979), until after petitioner's trial. I find that counsel was not required to anticipate this change in established law. See State v. Watson, 246 S.E.2d 25 (N.C. App. 1978). Thus, I conclude that counsel's failure to object was not inadequate representation by the standards adopted above.

VII

Petitioner asserts that his counsel rendered inadequate assistance by failing to object to the questioning of witnesses by jurors. I find that the questions asked merely sought clarification of points already made, and that they did not place counsel in a delemma, or infringe upon petitioner's rights. I thus conclude that counsel's decision not to object constituted adequate representation under the standards set forth above.

VIII

Petitioner's eighth claim asserts that counsel was incompetent in not objecting to the indictment, which failed to indicate that petitioner was being charged with a capital offense. The indictment charged that the petitioner did feloniously kill and murder the victim, and cited Va. Code Ann. § 18.2-31 (Cum. Supp. 1977), the capital murder statute. It is thus distinguishable from the indictment in Wilder v. Commonwealth, 217 Va. 145, 225 S.E.2d 411 (1976), which failed entirely to state an offense. Further, I find by counsel's motion to dismiss the Commonwealth's request to try petitioner under the capital offense statute, that petitioner knew in fact of the capital charge against him. I thus conclude that under the standards of Slayton or Marzullo, supra, counsel was not ineffective in failing to object to the indictment.

IX

Petitioner's final claim covers numerous matters in the habeas petition which were not raised by counsel at trial, and which petitioner asserts involve questions of constitutional mag-

nitude. I find that the allegations in paragraphs 20, 23, and 37 alleging arbitrary application of the death penalty, and in paragraph 26 alleging electrocution to be cruel and unusual punishment must fail for the reasons set forth in Spinkellink v. Wainright, 578 F.2d 582 (5th Cir. 1978). I have previously found to be without merit the allegations in paragraphs 23 and 67 - 74 relating to the appointment of attorneys for indigent capital defendants. The allegations contained in paragraphs 75, 76, and 79 were already unsuccessfully raised at trial and on appeal. Finally, I find that the allegations contained in paragraphs 27 - 52, 67-81, and 84 - 89 have either been decided adversely by the Supreme Court of Virginia or have been determined herein. I conclude therefore that petitioner's counsel was competent under the abovementioned standards in not raising these allegations.

Conclusion

Based on the above findings I conclude that for each claim raised herein, petitioner was afforded counsel, who were competent, diligent, through and at all times aggressively represented petitioner in accordance with standards demanded of attorneys in criminal trials, both by State and Federal statutes and cases. Petitioner's request for habeas corpus relief is hereby denied. The Attorney General shall prepare an order. Copies of this opinion have this day been mailed to petitioner and counsel. Petitioner is hereby notified of his right to appeal my decision.

March 14, 1980

Russell M. Carnal Judge

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 24th *day of* April, 1981.

Michael Marnell Smith, Appellant,

against Record No. 801091
Circuit Court No. 3209

Edward C. Morris, Superintendent of
the Mecklenburg Correctional Center, Appellee.

From the Circuit Court of the City of Williamsburg
and County of James City

Finding no reversible error in the judgment complained of, the court refuses the petition for appeal filed in the above-styled case.

The said circuit court shall allow court-appointed counsel the total fee set forth below and also their necessary direct out-of-pocket expenses. And it is ordered that the Commonwealth recover of the appellant the costs in this court and in the court below.

A Copy,

Teste:

Allen L. Lucy, Clerk

By: Deputy Clerk

Costs due the Commonwealth
by appellant in Supreme
Court of Virginia:

Attorneys' fee	$400.00 plus their costs and expenses
Filing fee	25.00

Teste:

Allen L. Lucy, Clerk

By: Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 12th *day of* June, 1981.

Michael Marnell Smith, Appellant,

against Record No. 801091
Circuit Court No. 3209

Edward C. Morris, Superintendent of
the Mecklenburg Correctional Center, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on April 24, 1981, and grant a rehearing thereof, correspondence from counsel, and the decision of the United States Supreme Court in Estelle v. Smith, 49 U.S.L.W. 4490 (May 18, 1981), the prayer of the said petition is denied.

A Copy,

Teste:

Allen L. Finney
Clerk

K.D.

ORIGINAL

RECEIVED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 81-5390

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

MICHAEL MARNELL SMITH

Petitioner

v.

EDWARD C. MORRIS

Respondent

ON WRIT OF CERTIORARI TO

THE SUPREME COURT OF VIRGINIA

RESPONDENT'S BRIEF IN OPPOSITION TO GRANT OF CERTIORARI

Counsel for Respondent
James E. Kulp
Deputy Attorney General
900 Fidelity Building
830 East Main Street
Richmond, Virginia 23219
(804) 786-6563

QUESTION PRESENTED

WAS PETITIONER EFFECTIVELY REPRESENTED BY COUNSEL?

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STATEMENT OF THE CASE

The respondent is in general agreement with the Statement of Facts set forth by petitioner but certain additions need to be made to correct inaccuracies and omissions. For uniformity purposes references to the trial transcript will be designated (T.T.) and references to the transcript of the habeas corpus hearing will be designated (H.T.).

Prior to his examination, Dr. Dimitris not only warned petitioner that any statements by him during the examination could be used against him, but also advised petitioner that he could consult with his attorney (H.T. 177) and made it clear that petitioner could stop the interview at any time. (H.T. 178).

Dr. Wendall Pile did not testify that he had no training in forensic psychiatry, but instead stated that he had had no formal training in forensic psychiatry. (H.T. 13). Dr. Pile testified that he is called upon very frequently to do forensic evaluations. (H.T. 25). While Dr. Pile did not give petitioner any warnings about his statements, petitioner was warned by his attorney not to discuss any prior crimes with anyone, (H.T. 235, 236, 246, 259), and petitioner was aware of his rights when he told Dr. Pile that his attorney had advised him not to discuss any instances not related to the present offense. (H.T. 26, 27). Dr. Pile did not thereafter question petitioner about any prior instances, but later petitioner voluntarily revealed the information about the school bus incident. (H.T. 27). The petitioner has a high school

education and his attorney found that petitioner could understand what he was being advised. (H.T. 226).

Dr. Showalter never testified that Dr. Pile's diagnosis was clinically unsupported. He testified that he did not believe the examination by Dr. Pile would be sufficient because of the limited time available (H.T. 92), however, he was unwilling to say that it could not be done. (H.T. 127).

The record shows that petitioner's attorneys did attempt to contact Dr. Pile after his examination to discuss his diagnosis, but because Dr. Pile was out of the country this information was supplied by Dr. Pile's associate, Dr. Cox. (H.T. 22).

ARGUMENT

PETITIONER DID RECEIVE THE ADEQUATE ASSISTANCE OF COUNSEL.

A. The Trial Court Applied the Correct Standard.

Petitioner first asserts that this Court should address again the standard for ineffective assistance of counsel, pointing out the dichotomy in the test utilized by the Supreme Court of Virginia and the Fourth Circuit Court of Appeals. The Virginia Supreme Court uses the "farce and mockery" standard, Slayton v. Weinberger, 213 Va. 690, 194 S.E.2d 703 (1974), whereas, the Fourth Circuit uses the "range of competency" test, Marzullo v. Maryland, 561 F.2d 540 (1977).

It appears that not all courts follow the same test for determining competency of counsel as three circuits continue to adhere to the "farce and mockery" standard. See, e.g., Gillihan v. Rodriguez, 551 F.2d 1182 (10th Cir.), cert. denied,

434 U.S. 845 (1977); Rickenbacker v. Warden, 550 F.2d 62 (2d Cir. 1976), cert. denied, 434 U.S. 826 (1977); United States v. Madrid Ramirez, 535 F.2d 125 (1st Cir. 1976). While it may be necessary for this Court to announce a single constitutional rule for judging competency of counsel, this case does not present the appropriate vehicle for so doing. In ruling on the petition in this case the trial court found that petitioner received adequate assistance of counsel under both the "farce and mockery" standard and the "range of competency" standard. See, Findings of Fact, p. 2 of Appendix attached to petition. Consequently, any undertakings to delineate which test should be utilized would have no practical effect upon this case since both tests were applied.

Petitioner urges that even though the trial court applied the "range of competency" test to this case, the Court did not appreciate the special significance of a capital case. Nothing in the record supports such an assertion. Every defendant is entitled to effective representation regardless of the punishment which may be imposed. What is required of counsel is normal not exceptional representation. Moore v. United States, 432 F.2d 730 (3d Cir. 1970).

B. Counsel Did Protect Petitioner's Fifth Amendment Privilege Against Self-Incrimination.

At petitioner's request the trial court ordered a psychiatric examination by Dr. Pile. Dr. Pile was the psychiatrist chosen by the petitioner. (H.T. 261). Prior to any examination

petitioner's attorney advised him on more than one occasion not to discuss the present offense or any other offenses with anyone. (H.T. 235, 236). The attorneys felt that petitioner understood this advice (H.T. 226), and had no reason to believe petitioner would not follow their advice. (H.T. 237).

Not only was petitioner warned not to discuss these events by his attorneys, Dr. Dimitris prior to his examination also warned petitioner that any statements could be used against him. (H.T. 177). Further, it is abundantly clear that petitioner understood and appreciated the fact that he had been warned not to discuss these events when he was examined by Dr. Pile. During the course of Dr. Pile's examination, petitioner specifically told Dr. Pile that his attorneys had warned him not to discuss the events. (H.T. 26, 27). It is equally clear that notwithstanding his rights, petitioner voluntarily revealed the information concerning the school bus incident. (H.T. 27).

This Court has recognized that a person may waive his rights against self-incrimination. Miranda v. Arizona, 384 U.S. 436 (1966); Estelle v. Smith, ___U.S.___, 68 L.Ed.2d 359 (1981). The records in this case stand uncontradicted that petitioner had been warned of his rights and voluntarily waived his rights to silence. Petitioner has never denied that he was warned of his rights or that he voluntarily waived them. It is to be noted that petitioner was not called to testify at the habeas hearing.

The trial court has found as a fact that petitioner was adequately warned and voluntarily waived his right to self-incrimination. Findings of Fact, p. 3.

Petitioner suggests that the attorneys should have accompanied him to the examination to insure he would remain silent. As this Court noted, however, in Estelle v. Smith, supra, there is no right to have an attorney actually present during the examination. ___U.S.___, 68 L.Ed.2d at 374, n. 14. Since the record is uncontradicted that petitioner fully recognized his right to remain silent during the conduct of the examination, no purpose could have been served by the attorney accompanying petitioner to the examination.

Petitioner asserts that counsel's advice not to discuss the circumstances of the present offense with the psychiatrist would have made it impossible for a psychiatric examiner to render an opinion regarding the petitioner's mental state at the time of the offense. Dr. Dimitris testified, however, that it is not essential that a person tell the psychiatrist about the events in order to render an opinion, and in fact ninety-five percent of the people he examines do not furnish this type of information. (H.T. 180, 181).

At the time of petitioner's trial his counsel was aware of the decision in Gibson v. Commonwealth, 216 Va. 412 (1975), which held that there was no physician-patient privilege in a criminal prosecution in Virginia. Accordingly, petitioner's attorneys advised him not to discuss the events in order to protect him.

The petitioner cites Gibson v. Zahradnick, 518 F.2d 75 (4th Cir. 1978), in support of his allegation that counsel was ineffective in protecting his right against self-incrimination. Of course this decision was not rendered until July 19, 1978, some eight months after petitioner's trial. It can hardly be said that counsel was ineffective in not following a decision which had not yet been rendered.

C. Counsel Was Effective At The Sentencing Hearing

It must be noted that this case is completely inapposite from Estelle v. Smith. In this case it was the petitioner who sought the examination by Dr. Pile, and it was the petitioner who brought out on examination Dr. Pile's diagnosis. (T.T. 936). The record shows that on cross-examination by petitioner's attorney, Dr. Pile was asked several short questions concerning his examination of petitioner, and then petitioner's attorneys conferred one with another. (T.T. 395-396). It was after this conference between the attorneys that Dr. Pile was asked about his diagnosis.

At the plenary hearing petitioner's attorney testified that he could not then recall the specific reason why Dr. Pile's diagnosis was elicited. (H.T. 239, 267). During his cross-examination of Dr. Pile, petitioner's counsel attempted to show that petitioner was suffering from some mental condition at the time of the crime (T.T. 937, 938, 940), and that such condition could be treated. (T.T. 938, 939). This same line of questioning,

was repeated on the cross-examination of Dr. Dimitris (T.T. 948, 950, 951). During argument to the jury petitioner's counsel specifically argued that petitioner was suffering from an illness that he could not help (T.T. 1082, 1083), and asked the jury to give petitioner the opportunity to get treatment for his illness. (T.T. 1084-1086). The trial court found that counsel elicited Dr. Pile's testimony in an effort to establish that petitioner was suffering from a mental illness which could be treated and since this was the only reasonable defense, counsel's cross-examination was the product of informed, professional deliberation, and thus competent. Findings of Fact, pp. 7, 8. Even though some of Dr. Pile's testimony was prejudicial to petitioner, this is not sufficient to find counsel to be ineffective. See, Reynolds v. Mabry, 574 F.2d 978 (8th Cir. 1978).

The record establishes that the only reasonable defense for petitioner in the present case was to attempt to convince the jury that petitioner was suffering from an illness for which he was not responsible, and that such illness could be treated. That counsel's attempt was unsuccessful is not the measure of whether counsel was effective. In this same vein, the Eighth Circuit said in Robinson v. United States, 448 F.2d 1255, 1256 (1970):

> "Hindsight can always be utilized by those not in the fray so as to cast doubt on trial tactics a lawyer has used. Trial counsel's strategy will vary even among the most skilled lawyers. When that judgment exercised turns out to be wrong or even poorly advised, this fact alone cannot support a belated claim of ineffective counsel."

D. Counsel Adequately Investigated The Mental Mitigating Abnormalities.

Dr. Dimitris testified that petitioner's attorneys were very eager to know his findings and any extenuating circumstances that could be of help. (H.T. 170). The attorneys were not satisfied with basics (H.T. 189). Petitioner's attorneys testified that he wanted to establish mental mitigation. (H.T. 234).

The record shows that neither Dr. Pile nor Dr. Dimitris had called to their attention the specific language of § 19.2-264.4B. (H.T. 21, 188). This fact, however, does not mean that counsel did not conduct an adequate investigation.

Both Dr. Pile and Dr. Dimitris, however, testified that their examinations were sufficiently broad enough to allow them to render an opinion on the issues of whether the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance, and whether at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired. As to each question both doctors testified that they were unable to find evidence to support either question. (H.T. 32, 33, 215, 216). Consequently, whether counsel specifically brought the language of the statute to the attention of the doctors, petitioner suffered no prejudice since neither doctor found evidence of either mental mitigating abnormality.

Petitioner relies upon Coles v. Peyton, 389 F.2d 224 (4th Cir. 1968), for the proposition that competent counsel must conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed. In Jackson v. Cox, 435 F.2d 1089 (4th Cir. 1970), the court apparently limited Coles, by distinguishing it as a case of virtually complete lack of investigation that was not controlling in a case where there were shortfalls in investigation, yet counsel had performed more than a "perfunctory" investigation.

The petitioner further relies upon the cases of Wood v. Zahradnick, 578 F.2d 980 (4th Cir. 1978), and Brennan v. Blankenship, 472 F. Supp. 149 (W.D.Va. 1979). Respondent submits that these cases are inapposite to the facts in the present case. In Wood the court found counsel ineffective for the reason that he completely failed to explore an insanity defense when evidence was known to counsel which indicated such a defense. In Brennan, the court concluded that counsel was ineffective in failing to follow up on a psychiatrist's opinion that the defendant was insane at the time of the crime. In the present case petitioner's counsel took steps to explore petitioner's mental condition and any matters in mitigation.

In its Findings of Fact, the trial court found that petitioner suffered no prejudice from counsel's failure to direct the psychiatric examinations towards the mental mitigating abnormalities. The record is uncontradicted that petitioner

did not in fact possess either of the mental mitigating abnormalities.

In the last analysis, all courts recognize that the performance of counsel must fall below a minimum, not just an abstract "norm". There must be serious derelictions. A shortfall by defense counsel that is perceptible but is modest rather than egregious is no basis for a judicial interposition. Any claim of ineffectiveness must turn not on abstractions as to duty, but on an appraisal of consequences. As noted in United States v. DeCoster, 424 F.2d 196 (D.C.Cir. 1979):

> "The claimed deficiency must fall measurably below accepted standards. To be 'below average' is not enough, for that is self-evidently the case half the time. The standard of shortfall is necessarily subjective, but it cannot be established merely by showing that counsel's acts or omissions deviated from a checklist of standards." 624 F.2d at 214.

CONCLUSION

The trial court has concluded that petitioner was afforded effective assistance of counsel under two different standards. The record amply supports the finding of the trial court. Accordingly, respondent submits that the petition for writ of certiori should be denied.

Respectfully submitted,

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